IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27/06/2003

CORAM

THE HONOURABLE MR.JUSTICE V.KANAGARAJ

SECOND APPEAL NO.1488 OF 1991

1.Mohideen Khan
2.Mathab Khan
3.Chote Jan ... Appellants

-Vs-

1.Sabjan Sahib
2.Korima Bi ... Respondents

Second Appeal preferred under Section 100 C.P.C. for the relief as stated therein.

For appellants : Mr.S.I.Samiullah

For respondents : No Appearance

:JUDGMENT
The above Second Appeal is directed against the judgment and decree dated 19.7.1991 rendered in A.S.No.122 of 1989 by the Court of Additional District Judge, South Arcot at Cuddalore thereby varying the judgment and decree dated 7.3.1989 rendered in O.S.No.107 of 1986 by the Court of Subordinate Judge, Vridhachalam.

2. On a perusal of the materials placed on record and upon hearing the learned counsel for the appellants, it comes to be known that the defendants 1 to 3 in the suit are the appellants herein and that the first respondent herein has filed the suit before the trial Court for partition and separate possession of plaintiff's 2/9th share in the suit properties and for mesne profits from the date of plaint till delivery of possession to be ascertained in the final decree proceedings and for costs. The case of the plaintiff is that himself and defendants 1 to 3 are brothers and the 4th defendant is their sister; that their father Nawazkhan died about 15 or 16 years back leaving the plaintiff and defendants as his heirs; that their mother Chanbi predeceased their father; that the suit properties belonged to their father Nawazkhan and on his death, under Muslim Law, the plaintiff and defendants 1 to 3 became entitled to each 2/9 shares while the 4th defendant became entitled to 1/9th share; that the plaintiff and defendants are in joint possession of the suit properties; that in spite of his demand since the defendants 1 to 3 are evading to effect a partition, the plaintiff issued a

notice dated 9.8.1986 for which the defendants 1 to 3 gave a reply with false allegations; that it is false to say that their father Nawazkhan orally released his share in the suit properties to defendants 1 to 3 and that defendants 1 to 3 orally purchased the shares of Jalal Sahib and Babajan, who are brothers of their father Nawazkhan; that Jalal and Babajan received some other property and so Nawazkhan was absolutely entitled to the suit properties; that the oral sale and oral relinquishment pleaded by the defendants 1 to 3 are totally false; that the plaintiff and defendants are in joint possession of the suit properties and it is not true to say that defendants 1 to 3 have acquired title by adverse possession and ouster as claimed in the reply notice and hence the suit.

3. The first defendant filed a written statement which was adopted by other defendants. In the written statement, the defendants would admit the relationship between parties but would deny all other allegations of the plaint. The defendants would submit that the suit properties originally belonged to their paternal grand father Mathab Khan and on his death, the suit properties were inherited by his three sons, Nawazkhan, Jalal and Babajan, thus their father Nawazkhan became entitled to 1/3rd share in the suit property; that their father Nawazkhan and his brothers divided the properties at a panchayat in the village more than thirty years back and were in possession and enjoyment of their respective shares; that in Item No.1 of the suit properties, Nawazkhan and his two brothers got each 1.16 acres; that in Item No.2, Jalal got the Northern 0.33 cents and Babajan got the Southeren 0.33 cents and Nawazkhan got another 0.33 cents in some other item for his share which he subsequently sold; that defendants 1 to 3 orally purchased the share of Jalal about 25 years back and later on about 23 years back, they orally purchased the share of Babajan also and since then defendants 1 to 3 are in possession and enjoyment of the properties purchased by them in their own right.

4. The defendants would further submit that to meet the marriage expenses of the plaintiff, their father Nawazkhan sold the properties belonging to his wife Johan Beevi about thirty years back and to compensate the same, their father orally released his 1/3rd share in Item No.1 to defendants 1 to 3 in the year 1958 and since then, the defendants 1 to 3 are in possession and enjoyment of the suit items No.1 and 2 to the exclusion of the plaintiff and by ousting him; that regarding Item No.3, defendants 1 to 3 are in enjoyment by having separate door numbers; that the plaintiff having no interest in any of the suit properties, left the native village about 28 years back and then went to Atthur Taluk and lives in Kattukottai Puthur near Attur; that the plaintiff never enjoyed the suit properties; that the defendants 1 to 3 have prescribed title over all the suit properties by excluding the plaintiff to his knowledge for more than the statutory period and that the name of the 4th defendant is Noorjehan but not Korimabi. On such averments, the defendants would pray to dismiss the suit with costs.

5. Based on the above pleadings by parties, the trial Court would frame the following issues for determination:
1.Whether the entire suit properties do not belong to Nawazkhan?
2.Whether the partition of Nawazkhan pleaded by the defendants is true?

3.Whether the oral purchase pleaded by the defendant is true?
4.Whether the ouster pleaded by the defendants is true?
5.Whether the plaintiff is entitled to partition and separate possession of 2/9th share in the suit properties?
6.To what relief?

6. Thereafter, the trial Court would conduct the trial wherein the plaintiff would examine himself as sole witness for oral evidence as P.W.1 and would mark two documents for documentary evidence as Exs.A.1 and A.2. On the contrary, on behal fendants, the first defendant besides examining himself as D.W.1 would also examine four more witnesses as D.Ws.2 to 5 for oral evidence and would mark 40 documents for documentary evidence as Exs.B.1 to B.40. In appreciation of the evidence placed on record and upon hearing the learned counsel for both, the trial Court would decree the suit as regards suit Items No.1 and 3 and negatived the prayer with regard to suit Item No.2. Aggrieved, the plaintiff preferred an appeal in A.S.No.122 of 1989 before the Court of Additional District Judge, South Arcot at Cuddalore and the defendants 1 to 3 also preferred a cross appeal. The learned appellate Court Judge also upon hearing the learned counsel for both and in appreciation of the entire evidence placed on record has held that the plaintiff is entitled to 2/9 shares in all the items of the suit properties, thus allowing the appeal preferred by the plaintiff and dismissing the cross-appeal preferred by the defendants 1 to 3. It is only against such conclusions arrived at by both the Courts below, the defendants 1 to 3 have come forward to prefer the above second appeal on certain grounds as brought forth in the grounds of appeal and this Court admitted the same for determination of the following substantial questions of law:

1.Whether the decisions of the Courts below - holding that the plea of ouster against the plaintiff herein is not true and not acceptable - are valid and true?

2.Whether the findings of the Courts below holding that the appellants herein have not prescribed title to the suit properties by adverse possession are true and valid and sustainable in law?

3.Whether the findings of the Courts below holding that the suit properties do not belong to the plaintiff's family and that the other sons of Mathab Khan were not allotted suit properties in the oral partition in the place of admission by the plaintiff-first respondent herein, are valid?

4.Whether the decision of the Courts below holding that once oral sales are not true and not acceptable as pleaded by the appellants herein, the possession of the appellants does not become adverse to the interest of the plaintiff-first respondent herein are true and valid?

7. When the above matter was taken up for consideration, there was no representation on the part of the respondents. Hence, this Court is left with no option but to deliver the judgment upon hearing the learned counsel for the appellants and on perusing the materials placed on record.

8. During arguments, the learned counsel appearing on behalf of the appellants, besides apprising this Court of the facts and circumstances encircling the whole case as pleaded and projected by parties, would clarify that the4th defendant is their sister and she is added as a respondent in this second appeal since she was not available in the first appeal. The learned counsel would also support the case of the appellants citing the following judgments:

1. AIR 1979 SC 1142 (PADMINIBAI vs. TANGAVVA AND OTHERS)
2.(2001)2 MLJ 624 (YASODAI ALIAS POONGAVANAM vs. KANNAN AND OTHERS)
3.(1972)1 MLJ 466 (MINOR IBRAMSA ROWTHER AND OTHERS vs. SHEIK MEERASA ROWTHER AND OTHERS)

9. In the first judgment cited above, the Honourable Apex Court has held:

"If one party was in exclusive and open possession of suit lands adversely to the defendant for a period exceeding 12 years and his possession was never interrupted or disturbed, he has acquired ownership by prescription and the suit filed within 12 yeas of his death was within time."

10. In the second judgment cited above, a learned single Judge of this Court would quote from yet another judgment reported in (1942) 2 MLJ 321 = AIR 1942 Madras 622 (PALANIA PILLAI vs. AMJATH IBRAHIM) wherein it is held:

"When one of several co-sharers lets into possession a stranger who proceeds to cultivate the land for his own benefit, the other cosharers must, unless they deliberately close their eyes, know of what is going on, but if they are so regardless of their own interests, they must take the consequences. Where a person who is in possession under a usufructuary mortgage granted by one of several co-parceners remains in possession of the land and cultivates it for years, a position which we have here, there can be no doubt that the requirements of continuity, publicity and extent for adverse possession are fully complied with."

11. In the third judgment cited above, it has been held by a Division Bench of this Court:

"The plaintiff instituted a suit for partition about thirty years after the death of his father. As a result of such inordinate delay, other persons who were alleged to be parties to an earlier partition pleaded in defence and who could have given evidence were dead. Even if there was any gap or defect in the evidence, an adverse inference will have to be drawn against the plaintiff in view of the inordinate delay in his asserting his rights and the plaintiff must take the responsibility for the same."

On such arguments, the learned counsel appearing on behalf of the appellant would ultimately pray to allow the above second appeal setting aside the judgment and decree passed by both the Courts below.

12. In consideration of the facts pleaded,having regard to the materials placed on record and upon hearing the learned counsel for the appellant in the absence of any representation made on the part of the respondent, what comes to be known is that it is a suit for partition filed by one of the brothers as against three other brothers and one sister seeking 2/9 shares in all the three items of suit properties, since, according the first respondent/plaintiff, their father, the deceased Nawazkhan, who was entitled to the suit properties, left not only the plaintiff and the defendants 1 to 4 but also the suit properties and from the nature of the holding of the property by their father and the position of law pertaining to the same, the plaintiff would come forward to assert that himself and three other brothers are each entitled to 2/9 shares and the 4th defendant, the only sister, is entitled to the remaining 1/9 share.

13. This suit is hotly contested by the defendants 1 to 3 by contending that their grand father had three sons, one of whom was their father Nawazkhan, who became entitled to 1/3rd share in the suit after the death of their grand father Mathab Khan and in a panchayat, they divided the properties, in which Nawazkhan and his two brothers got each 1.16 acres in Item No.1; that Jalal got Northern 0.33 cents in Item No.2 and Babajan got the Southern 0.33 cents and Nawazkhan got another 0.33 cents in some other item; that the defendants 1 to 3 also orally purchased the share of Jalal about 25 yeas back and after two years, they purchased the share of Babajan also and since then, the defendants 1 to 3 are in possession and enjoyment of the properties. Yet another plea would be advanced on the part of the defendants to the effect that for the marriage of the plaintiff, their father spent a huge sum 30 years back and to compensate the same, their father orally released his 1/3rd share in Item No.1 in favour of the defendants and since then, the defendants 1 to 3 are in possession of the same to the exclusion of the plaintiff and ousting him; that the plaintiff left the village 25 years back and settled in another place and therefore he never enjoyed the suit properties; that the defendants 1 to 3 have prescribed the title over all the suit properties by adverse possession and hence they would ultimately pray to dismiss the suit with costs.

14. The trial Court, having framed proper issues, would permit the parties to record their evidence oral and documentary and appreciating the same would ultimately decree the suit regarding suit Items No.1 and 3 in favour of the plaintiff and negativing the prayer with regard to the suit Item No.2. Aggrieved, the plaintiff preferred an appeal in A.S.No.122 of 1989 and the same having been allowed in full, the defendants 1 to 3 in the suit have come forward to prefer the above second appeal and this Court has admitted the same for determination of four substantial questions of law extracted in Paragraph No.6 above, of which the first substantial question of law is regarding the ouster of the plaintiff as pleaded by the defendants, the second and fourth substantial questions of law are pertaining to adverse possession by prescription of title to the suit properties by the defendants and the third substantial question of law is regarding admission by the plaintiff and the findings of the Courts below holding that the suit properties do not belong to the plaintiffs' family and the other sons of Mathab Khan were not allotted with anything in the suit properties in the oral

partition.
15. Basically, the pleadings and prayer of the plaint in the suit are simple and straight forward in the sense that the plaintiff has filed the suit claiming that since his father is entitled to the suit properties, in accordance with the Muslim Law, he is entitled to 2/9 shares of the same as it is the case of the other three brothers while his sister is entitled to 1/9 share since there is no other claimant for the suit properties especially in view of the fact that their mother pre-deceased her husband. As against this, the defendants would set up a long and cumbersome plea as though they acquired the properties 30 years back, all on either oral partition or on oral purchase, without being supported by strong documentary evidence. The suit properties are in three schedules, the first schedule is a dry land comprised in S.No.105/5 in an extent of 3.48 acres with well and oil engine, the second schedule is wet lands falling under S.No.25/13 measuring 66 cents and the third schedule falling under Survey No.102 consisting of a thatched house and vacant site measuring 90 x 30 ft. Regarding the existence of these properties, there is no dispute among the plaintiff and the defendants whereas only the entitlement of the plaintiff to 2/9 shares in all the three items of the suit properties is stiffly contested by the defendants.
16. The trial Court, having framed six issues extracted in para No.5 supra, in order to extract the answer for all those questions raised both on the part of the plaintiff and the defendants, regarding the entitlement of the suit property by their father, partition and the oral purchase as pleaded by the defendants, the ouster pleaded by the defendants and the entitlement of the plaintiff for a partition and separate possession of 2/9 shares in the suit properties as prayed for, would weigh heavily in evidence in the context of the pleadings and having its own discussions and appreciating the evidence, the trial Court would ultimately find that Nawazkhan was not given Item No.2 of the suit properties, but only the other two items and 33 cents in yet another item and would not believe the defendants plea regarding the suit properties and therefore would arrive at the ultimate conclusion that the plaintiff is entitled to 2/27 shares in Items No.1 and 3 and not entitled to any share in the second item of the suit properties and therefore the plaintiff himself would prefer an appeal.

17. The appellate Court, having framed eight points for determination of the said appeal and having had its own discussions, would arrive at the conclusion that the deceased Nawazkhan was entitled to all the suit properties in Items No.1 to 3 in which the defendants 1 to 3 cannot claim on plea of oral sale; that even in consideration of the plea of the defendants No.1 to 3 that they are in possession of the suit properties, the appellate Court below would treat that such of their possession is inclusive of the right of possession of the plaintiff and the 4th defendant and just for the simple reason that the plaintiff was away in another place, he would not become disentitled to his share or the right of possession and that the defendants have not proved their title to the suit properties by adverse possession and therefore would arrive at the firm conclusion that the plaintiff is entitled to 2/9 shares of the suit properties and would pass the decree accordingly but without costs thus passing the preliminary decree further remarking that for the mesne profits, separate proceeding shall be taken in accordance with Order 20 Rule 18 CPC.

18. Aggrieved, the defendants 1 to 3 have come forward to prefer the above second appeal on certain grounds brought forth in the grounds of appeal and the Court of admission has admitted the above second appeal for determination of the four substantial questions of law extracted, of which the first is regarding the ouster against the plaintiff, the second and fourth regarding the perfection of title by the defendants by adverse possession and the third regarding the decisions of the lower Courts on some admission said to have been made on the part of the first respondent/plaintiff.

19. So far as the substantial questions of law Nos.1,2 and 4 are concerned, the defendants pleaded that the plaintiff had gone away from home 28 years back and started living in another place and therefore he is not in possession of the suit properties and hence he cannot claim any right over the suit properties and that he has been ousted from possession by the defendants being in effective physical possession and enjoyment of the suit properties. Likewise, they have also pleaded perfection of title by adverse possession by prescription. Both the trial Court and the first appellate Court have concurrently held that the plea of ouster has not been proved by the defendants with legal evidence nor is such a plea admitted on the part of the plaintiff and while so, the plaintiff being the brother of the defendants and part of the family and being entitled to the suit properties, unless the ouster is established with very strong evidence, Courts would not grant such relief as against a co-sharer of the suit properties, which they acquire by birth. Moreover, by all such happenings said to have occurred, as it has been brought forth in the pleadings, the defendants have failed to establish as to how the right of succession for a share of the suit properties left by their father has been extinguished so as to deny the due for the plaintiff and therefore on ambiguous and inconsistent pleas and evidence, no decision could be arrived at regarding such a plea taken on the part of the defendants as against their brother's rights and therefore on evidence, both the Courts below have rightly rejected the plea of the defendants.

20. However, the trial Court would find that the plaintiff is only entitled to a limited share and not that which has been prayed for in the plaint. Whereas the first appellant Court, having its own discussions on points framed, would ultimately arrive at the conclusion to hold that the plaintiff is entitled to all the reliefs as prayed for. At this juncture, this Court is in perfect agreement with the reasons assigned on the part of the first appellate Court for having arrived at its conclusion to grant the preliminary decree in favour of the plaintiff as prayed for rejecting the plea of ouster and adverse possession, which, according to the first appellate Court, on facts and circumstances, have not been proved. Therefore, this Court does not find any reason to interfere with such of the findings legally rendered by both the Courts below particularly that of the first appellate Court and therefore this Court is of the view that the first appellate Court is perfectly right in arriving at its conclusions and this Court has no hesitation in deciding the substantial questions of law Nos.1,2 and 4 in favour of the first respondent/plaintiff.

21. Coming to the third substantial question of law, this Court is of the view that the said substantial question of law has no

relevance in the context of the case and based on some pleadings it has been framed. While both the Courts below do not admit the oral sale, there is no question of the courts below arriving at the decision that the suit properties do not belong to the plaintiff's family at all nor is it necessary to probe into the non-existent and irrelevant matters such as the allotment of properties in favour of the other sons of Mathab Khan and it is prudent only to consider and pass the judgment based on the available properties and parties. Therefore, particularly in view of the decisions arrived at by both the Courts below especially the first appellate Court, on facts and circumstances of the case and on evidence, the third substantial question of law has no relevance and therefore it has also to be answered in the negative.

22. So far as the judgments cited on the part of the appellants are concerned, in the first judgment reported in AIR 1979 SC 1142, general principles of the requirement of 12 years for perfection of title by adverse possession are brought forth. In the second judgment reported in (2001)2 MLJ 624 wherein the judgment reported in (1942) 2 MLJ 321 is relied on, the defendants have failed to establish that one of the co-sharers let into possession a stranger who proceeded to cultivate the land for his own benefit and it has been held that the other co-sharers cannot deliberately close their eyes without knowing what is going on and in such event, if they are regardless of their own rights, it could be taken that one co-sharer perfected his title by adverse possession gets proved. The facts of the said case have nothing to do with the facts of the case in hand and therefore the proposition held therein also becomes inapplicable to the case in hand.

23. In the next judgment reported in (1972) 1 MLJ 466, the delay is brought forth in filing the suit and the adverse inference to be drawn, which has neither been pleaded nor any issue framed nor determined by the lower Court as a result of which this judgment also becomes irrelevant to the context of the case.

24. For all the above discussions held, since all the substantial questions of law have been answered against the appellant and the judgments cited are also not applicable to the facts of the case in hand, it has to be held that the first appellate Court has arrived at a valid decision in passing the preliminary decree in favour of the plaintiff as prayed for and this Court does not find any valid or tangible reason to interfere with the well considered and merited judgment and decree passed by the first appellate Court and hence the following judgment:

In result,

(i)the above second appeal fails and the same is dismissed.

(ii)The judgment and decree dated 19.7.1991 rendered in A.S.No.122 of 1989 by the Court of Additional District Judge, South Arcot at Cuddalore thereby varying with the judgment and decree dated 7.3.1989 rendered in O.S.No.107 of 1986 by the Court of Subordinate Judge, Vridhachalam is hereby confirmed.

However, in the circumstances of the case, there shall be no order as to costs.

Index: Yes
Internet: Yes
Rao

To

1.The Additional District Judge,
South Arcot at Cuddalore.

2.The Subordinate Judge,
Vridhachalam.